STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

B. BENEDICT WATERS, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Case No. LA-CE-216-H LA-CE-221-H PERB Decision No. 716-H December 30, 1938
B. BENEDICT WATERS, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Case No. LA-CE-217-H

Appearances; B. Benedict Waters, on his own behalf; Claudia Cate and Susan H. Von Seeburg, Attorneys, for the Regents of the University of California.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

SHANK, Member: The above-captioned unfair labor practice cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Regents of the University of California (University or Respondent) to the Statement of Reasons for Dismissal of Complaint (attached hereto) issued by the PERB

administrative law judge (ALJ).[1] The cases, filed by B. Benedict Waters (Waters), were consolidated on appeal because they each raise the same issue.

BACKGROUND

The ALJ dismissed each of the complaints based upon the charging party's failure to present evidence sufficient to establish a prima facie case of violation of the Higher Education Employer-Employee Relations Act (HEERA).[2] Both unfair labor practice charges arose out of the University's handling of two grievances that had been filed by Waters. At each of the hearings, the ALJ determined that Waters had not established that his complaints were subject to the grievance procedure set forth in the collective bargaining agreement. The ALJ concluded that since Waters failed to show his complaints were properly subject to the grievance procedure, the University's actions with respect to that procedure, whatever they might have been, caused no harm

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[1]Although the ALJ stated his reasons for dismissing the complaints at the hearings, the University requested that the reasons be set forth in writing.

[2]HEERA is codified at Government Code section 3560 et seq. The complaints in both cases alleged a violation of section 3571(a), which states:

> It shall be unlawful for the higher education employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

to Waters and thus did not constitute a cognizable violation of HEERA.

While not challenging the dismissals themselves, the University excepts to the language contained in each Statement of Reasons for Dismissal of Complaint on the grounds that portions thereof could be "read out of context" and misconstrued as a binding, substantive ruling of contract interpretation. The University also excepts to some factual statements. In both cases, Waters objected to the exceptions by asserting that the University has no standing to file them.

The Board, after review of the entire record, finds that the dismissals of the complaints were proper and that the Statements of Reasons for Dismissal adequately set forth the grounds for those dismissals. With minor modifications to some of the findings of fact,[3] we affirm the ALJ's decisions, consistent with

[3]In Case No. LA-CE-216-H/221-H, the University excepts to the factual finding that "Waters' grievances were denied at the first level of the grievance procedure" (emphasis added). The University contends that: (1) the record in Case No. LA-CE-217-H establishes that only one of the two grievances was denied at first level; and (2) the University was precluded from introducing the history of the second grievance in Case No. LA-CE-216-H/221-H, We have reviewed the record and agree that it contains no evidence as to the fate of the second grievance at the first level.

In Case No. LA-CE-217, the University excepts to the ALJ's finding that Waters and Martinez mentioned the collective bargaining agreement in the course of their discussion over Waters' desire to file a formal grievance. (Statement of Reasons for Dismissal of Complaint, p. 2.) Upon a review of the record, we agree that the record contains no evidence to support a finding that the collective bargaining agreement was discussed. (TR., vol. I, pp. 24-26, 103, 107.)

In both cases, the University excepts to the finding that

the discussion below.

DISCUSSION

The preliminary issue before the Board is whether the University, as the responding party, has standing to challenge a Statement of Reasons for Dismissal of Complaint. In Palos Verdes and Pleasant Valley School District (1979) PERB Decision No. 96, the hearing officer dismissed an unfair practice charge on the grounds that the school district had not violated its duty to bargain, but in so ruling made findings that some subjects were within the scope of bargaining. The district filed exceptions to attack those findings. In finding the appeal properly before the Board, PERB stated that:

> It is well-recognized in civil matters, while a party may not ordinarily appeal a judgment in its favor, an appeal is proper if the judgment apparently in a party's favor is actually against that party. (See also Fresno Unified School District (1981) PERB Decision No. 156.)

In support of its conclusion, PERB noted that its regulations provide that a party may file exceptions to a Board agent decision. The regulations do not make a party's right to file exceptions to a decision dismissing a complaint conditional

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"The contract was in effect from July 1, 1986, to June 30, 1988" on the grounds that said contract was modified by reopener negotiations in 1987 resulting in a new contract effective January 4, 1988 through June 30, 1989. We note that PERB's files do not contain the new agreement.

upon the outcome of the case.[4]

PERB Regulation 32635 and Duarte Unified School District (1983) PERB Decision No. 281, relied upon by Waters to support his argument that only a charging party may file exceptions to a dismissal, are inapposite. Both the regulation and the case pertain only to the appealability of the dismissal of a charge based on a decision not to issue a complaint.[5]

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[4]PERB Regulations are codified at California Administrative Code, title 8, part III, section 31001 et seq. PERB Regulation 32300, Exceptions to Board Agent Decision, provides, in pertinent part:

> (a) A party may file with the board itself . . . a statement of exceptions to a Board agent's proposed decision issued pursuant to section 32215 . . . (emphasis added).

Section 32215, entitled Proposed Decision, is contained in Chapter 3, entitled HEARINGS, of PERB's Regulations. Thus, Regulation 32300(a) pertains to exceptions to dismissals of complaints as opposed to dismissals of charges.

[5]PERB Regulation section 32635 states, in pertinent part, that:

> (a) Within 20 days of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself . . . .
>
> (b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.
>
> (c) If the charging party files a timely appeal of the refusal, any other party may file with the Board itself an original and five copies of a statement in opposition within 20 days following the date of service of the appeal. . . . (emphasis supplied).)

When read in the context of the entire statutory scheme (See e.g., section 32530), the "dismissal" and "refusal" in section 32635 must be construed to refer to the decision of a Board agent not to issue a complaint based on a finding that an unfair

Although we find that the University in this case does have standing to except to a Statement of Reasons for Dismissal of Complaint, we believe that the opening paragraph of each Statement of Reasons for Dismissal of Complaint makes clear the ground for the dismissal as does the record itself.[6]

ORDER

For the foregoing reasons, we find the decisions dismissing the complaints are free from prejudicial error.

Chairperson Hesse and Member Camilli joined in this Decision.

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practice charge does not state a prima facie case. Similarly, the Board's holding in Duarte Unified School District (1983) PERB Decision No. 281 must be limited to cases where a charge, as opposed to a complaint, has been dismissed.

[6]As the University itself points out, the University cannot be collaterally estopped from relitigating any issue that it was precluded from fully litigating before this Board. The entire record would be admissible in a later proceeding for the purpose of determining what issues were fully litigated. (See generally 7 Witkin, Cal. Procedure (3d ed. 1985) section 255.)

STATE OF CALIFORNIA
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B. BENEDICT WATERS, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Case No. LA-CE-216-H LA-CE-221-H STATEMENT OF REASONS FOR DISMISSAL OF COMPLAINT

At the close of presentation of evidence by the charging party in these consolidated cases on May 20, 1988, I dismissed the complaint because of the charging party's failure to present evidence sufficient to establish a prima facie case of violation of the Higher Education Employer-Employee Relations Act (HEERA). At that time, I stated my reasons for dismissing the complaint. At the request of the respondent, I agreed to set forth in this second format my reasons for dismissing the complaint.

FINDINGS OF FACT[1]

In February 1987 charging party Benedict Waters, then a casual (temporary) employee of the University of California at Los Angeles, became dissatisfied with two actions of the University: (1) In Waters' view, the University, for racially

[1] The facts set out below are undisputed. Almost all the facts recited here are admitted in the University's Answer to the Complaint.

discriminatory reasons, refused to hire him for a permanent position; and (2) a managerial employee in his department made racially discriminatory remarks to him about purely personal behavior on non-working time.[2]

On or about May 6, 1987, charging party filed a grievance challenging both of these actions, alleging that each was a manifestation of racial discrimination. The grievance was filed pursuant to Article 4 of the collective bargaining agreement between the University and the American Federation of State, County and Municipal Employees, which covered the "Clerical and Allied Services Unit." That unit included Waters and other employees in similar positions.

On or about May 19, 1987, Waters filed a second grievance alleging racial discrimination in the University's refusal to hire him for a specified permanent position.

For reasons that are not relevant here, Waters' grievances were denied at the first level of the grievance procedure.[3] He sought review of his grievance at the second level, as defined by the contract.

On or about June 17, 1987, Waters filed with the state Department of Fair Employment and Housing (DFEH) a charge of

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[2]Nothing herein is intended as a finding of fact on the correctness of the charging party's allegations of discriminatory behavior.

[3]This first-level denial was the subject of PERB case number LA-CE-217-H.

employment discrimination by the University, based on the incidents that were the basis of his two grievances.

On June 19, 1987, the University informed Waters that it would not process his May 19 grievance any farther because the subject of the grievance was the same as the subject of a discrimination complaint that Waters had filed with the DFEH. On June 22, 1987, the University informed Waters it would refuse to process his May 6 grievance for the same reason.

In refusing to process the two grievances, the University relied on Section F of Article 4 ("Nondiscrimination in Employment") of the collective bargaining agreement. That section provided, in pertinent part:

> Except by mutual written agreement of the University and AFSCME, a grievance alleging a violation of this Article shall not be processed through Article 6 - Grievance Procedure on behalf of any employee(s) who files or prosecutes on his/her behalf . . . in any court or governmental agency a claim, complaint or suit under applicable federal, state, county or municipal law or regulation complaining of the action grieved. The grievance of any employee who is or becomes involved in such actions shall be considered to be withdrawn at the time such employee(s) becomes party to such action.

THE LEGAL THEORY OF THE COMPLAINT

The complaint alleges that by applying Article 4, Section F, the University violated Government Code section 12940(f),[4]

[4]The complaint initially specified section 12940(e). Without objection by respondent, it was amended at hearing to refer to subsection (f) of section 12940.

a section of the California Fair Employment and Housing Act.[5] By so doing, the complaint alleges, the University violated sections 3598 and 3571(a) of HEERA.

Government Code Section 12940 provides, in pertinent part, as follows:

> It shall be an unlawful employment practice . . . (f) For any employer . . . to discharge, expel or otherwise discriminate against any person because the person . . . has filed a complaint, testified or assisted in any proceeding under [the Fair Employment and Housing Act].

HEERA section 3598 provides, in its entirety:

> No memorandum of understanding shall contravene any federal or state law, including rules and regulations promulgated pursuant to such laws, prohibiting discrimination in employment.

HEERA section 3571(a) makes it unlawful for a higher education employer to intefere with employees in their exercise of rights protected by HEERA.

Waters' theory in this case is that the University discriminated against him by basing its refusal to process his grievances on the fact that he filed discrimination charges under the state's Fair Employment and Housing Act. That is, the University treated him differently, and worse, than it would have treated a grievant who had not filed a discrimination complaint under the state's Fair Employment and

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[5]The Fair Employment and Housing Act begins with government code section 12900.

Housing Act. By discriminating against him in this way, Waters argues, the University violated section 12940(f).

Further, the argument goes, because Article 4, Section F, by authorizing such treatment, contravenes Government Code section 12940(f), (a state law which prohibits discrimination in employment) it violates HEERA section 3598.

Finally, the complaint alleges, by violating section 3598, the University also violated section 3571(a), in that its actions interfered with Waters' statutory right to use the grievance procedure of the collective bargaining agreement.

DISCUSSION AND ANALYSIS

Section 3565 of the Higher Education Employer-Employee Relations Act provides, in pertinent part:

> Higher education employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

As noted above, HEERA section 3571 provides, in pertinent part, that it shall be unlawful for a higher education employer to interfere with employees in the exercise of rights protected by the statute.

In Regents of the University of California (1983) PERB Decision No. 308, PERB held that section 3565 protects the right of higher education employees to present grievances to their employers. In North Sacramento School District (1982) PERB Decision No. 264, the Board held that essentially

identical language in section 3543 of the Educational Employment Relations Act (EERA) guarantees employees the right to "assert rights established by the terms of a negotiated agreement," including the right of an individual employee to file a grievance under the contract. This holding is cited with approval by the Board in the Regents decision, PERB Decision No. 308.

The AFSCME contract covering the "Clerical and Allied Services" unit defines a "grievance" as "a written complaint involving an alleged violation of a specific provision of this Agreement during the term of this Agreement." The contract allows an individual employee to file a grievance under the contract (Article 6, Section A.5.).

The contract includes an article entitled "Nondiscrimination in Employment," Article 4. That article prohibits discrimination in application of the provisions of the contract: The first sentence of that article provides, in pertinent part:

> The provisions of this Agreement shall be applied to all members of the bargaining unit within the limits imposed by law or University regulations without regard to race, color, . . . national origin. . . .

This sentence declares that all provisions of the contract shall be enforced without discrimination based on race, color

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[6]I have taken official notice of the collective bargaining agreement, which is in PERB's files. Mendocino Community College District (1980) PERB Decision No. 144. The contract was in effect from July 1, 1986 to June 30, 1988.

or national origin. However, no other provision of the article, and no other provision of the contract, speaks of discrimination with respect to aspects of employment that are not covered by provisions of the contract.

Article 4 provides that violations of the Article may be grievable to various degrees, depending on the nature of the grievance alleged.

Waters[1] grievances had to do with a hiring decision and with allegedly racist comments made to Waters by a supervisor about a personal matter. Neither of these subjects is covered by any provision of the collective bargaining agreement.[7] Thus, neither of the actions complained of in the grievances was grievable under the collective bargaining agreement.

Under this analysis, it is not necessary to analyze the meaning of Sections 12940(f) or 3598. Waters had no contractual right to pursue his grievances through the contract grievance procedure. Therefore, whatever actions the University took in connection with the two discrimination grievances which Waters filed, the University did not, by these actions, deny Waters the right to avail himself of any contract

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[7]It is possible that the University provides to employees a non-contractual method of challenging, as discriminatory, employment-related actions which are not covered by the contract. There is no evidence that Waters tried to pursue any other administrative remedy. In any event, this case concerns only Waters' contract grievances and the University's response to them. .

rights. It follows then that the University, by these same actions, did not deny Waters any right protected by the HEERA.

In the hearing held in this case on May 20, the undersigned administrative law judge noted that all the factual allegations of the Complaint were admitted by the University's Answer. The charging party presented as evidence during his case-in-chief just two exhibits, these being the two grievances, one filed on May 6, the other on May 19, 1987. The charging party did not testify or call any witnesses to testify. The administrative law judge placed in evidence the two University letters advising Waters that his grievances would not be processed, in view of the discrimination complaints he had filed with the DFEH.

The hearing officer then advised Waters of the legal analysis set out above, and advised him that, in the absence of additional evidence, his complaint would be dismissed. Waters chose to present no additional evidence. The complaint was thereupon dismissed.

Pursuant to California Administrative Code, title 8, part III, section 32305, the dismissal order of May 20, 1988 shall become final unless a party files a timely statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See

California Administrative Code title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." See California. Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305, and 32140.

Dated: May 27, 1988

Martin Fassler

MARTIN FASSLER
Administrative Law Judge

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At the close of presentation of evidence by the charging party, May 19, 1988, I dismissed the complaint in this case because of the charging party's failure to present evidence sufficient to establish a prima facie case of violation of the HEERA. At that time, I stated my reasons for dismissing the complaint. However, at the request of the respondent, I agreed to set forth in this second format my reasons for dismissing the complaint.

STATEMENT OF FACTS

In February 1987 charging party, then a casual (temporary) employee of the University of California at Los Angeles, became dissatisfied with two actions of the University: (1) In Waters' view, the University, for racially discriminatory reasons, refused to hire him for **a** permanent position, which, he alleges, he had been told would be his; and (2) a managerial employee in his department made racially discriminatory remarks

to him about purely personal behavior on non-working time.[1]

Waters consulted with Frank Martinez, a University employee with responsibility for personnel matters in Waters' department, Architecture and Engineering. Waters explained to Martinez his desire to file a grievance about each of these matters, pursuant to the collective bargaining agreement between the University and the American Federation of State, County and Municipal Employees (AFSCME) covering the "Clerical and Allied Services" unit, which included Waters. Martinez, according to Waters' testimony, told Waters that, under the contract, he was not permitted to file a grievance about either matter until after making an "informal" effort to bring about a resolution of the problems.[2]

Waters pursued the two problems informally with the department chairman, Charles Oakley. In late April, Oakley sent Waters a letter, informing him that the permanent position Waters was seeking was not going to be filled, for budgetary reasons. In the same letter, Oakley told Waters that whatever comments had been made to Waters by the managerial employee

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[1]Waters alleges Barbara Corona-Sutton, executive assistant in the department which employed Waters, criticized Waters, a black man, for the manner in which he walked with his girl friend, a white woman, during their lunch hour, on the UCLA campus.

[2]The University denies the accuracy of this version of the conversation between Waters and Martinez. For reasons that will be apparent, there is no need to determine the accuracy of the testimony.

about his personal conduct were not made on behalf of the department.

On May 6, 1987, less than ten days after he received Oakley's letter, Waters filed a grievance about both matters. On May 21, 1987, Gail Cowling, a labor relations specialist in the University's personnel department, denied the grievance on the ground that it was not filed within 30 days of the occurrence of the incidents. She stated in her letter, "Any attempts at informal resolution do not waive the 30 day filing deadline set forth in Article 6, Section D.2. [of the collective bargaining agreement]"

Waters appealed this decision to the second level of the grievance procedure, where it was dismissed for reasons not relevant here.[3]

As charging party, Waters alleges that the University's action - dismissing his grievance for Untimeliness, after he delayed initial submission of the grievance based on (possibly incorrect) instructions from a University personnel officer - amounts to interference with Waters' statutory right to present a grievance pursuant to the collective bargaining agreement, in violation of Government Code Section 3571(a).

DISCUSSION AND ANALYSIS

Section 3565 of the Higher Education Employer-Employee Relations Act provides, in pertinent part:

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[3]The second-level dismissal is the subject of two other complaints, numbered LA-CE-216-H and LA-CE-221-H.

> Higher education employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

HEERA section 3571 provides, in pertinent part, that it shall be unlawful for a higher education employer to interfere with employees in the exercise of rights protected by the statute.

In Regents of the University of California (1983) PERB Decision No. 308, PERB held that section 3565 protects the right of higher education employees to present grievances to their employers. In North Sacramento School District (1982) PERB Decision No. 264, the Board held that essentially identical language in section 3543 of the Educational Employment Relations Act (EERA) guarantees employees the right to "assert rights- established by the terms of a negotiated agreement," including the right of an individual employee to file a grievance under the contract. This holding is cited with approval by the Board in the Regents decision, PERB Decision No. 308.

The AFSCME contract covering the "Clerical and Allied Services" unit allows an individual employee to file a grievance under the contract (Article 6, Section A.5.).[4]

[4] I have taken official notice of the collective bargaining agreement, which is in PERB's files. Mendocino Community College District (1980) PERB Decision No. 144. The contract was in effect from July 1, 1986 to June 30, 1988.

Further, the contract includes an article entitled "Nondiscrimination in Employment," Article 4. That article does not reach all forms of nondiscrimination. The first sentence of that article provides, in pertinent part:

> The provisions of this Agreement shall be applied to all members of the bargaining unit within the limits imposed by law or University regulations without regard to race, color, . . . national origin. . . .

This sentence declares that all provisions of the contract shall be enforced without discrimination based on race, color or national origin. No other provision of the article, and no other provision of the contract, speaks of discrimination with respect to aspects of employment that are not covered by provisions of the contract.[5]

Article 4 provides that violations of the Article may be grievable to various degrees, depending on the nature of the grievance alleged.

Waters' grievance had to do with a hiring decision and with allegedly racist comments made to Waters by a supervisor about a personal matter. Neither of these subjects is covered by any provision of the collective bargaining agreement. Thus, neither of the actions complained of in the grievance was grievable under the collective bargaining agreement. It

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[5]Nothing in this decision should be taken as a finding or suggestion that I find the discrimination allegations to be well founded. No evidence was presented on this question. Nor is anything in this decision intended to be a finding about any conversation Waters may have had with Martinez. The case was dismissed before the University had an opportunity to present evidence on this point.

follows that even if Waters' allegations about misleading statements made to him by Martinez are true, Waters was not denied a contractual right when the University dismissed his grievance as untimely. And, if that is correct, the University's dismissal of the grievance denied Waters no statutory right protected by sections 3565 and 3571.[6]

In the hearing on May 18 and 19, Waters testified about his conversations with Martinez and presented certain documents as exhibits. University counsel cross-examined Waters, and presented certain additional documents as evidence. Waters, as charging party, then rested his case.

Waters was then advised by the administrative law judge of the legal analysis set out above, and of the likelihood that his complaint would be dismissed in the absence of further evidence. He was given an opportunity to present additional evidence. He declined to do so. The complaint was then dismissed.

Pursuant to California Administrative Code, title 8, part III, section 32305, the dismissal of the complaint shall become final unless a party files a timely statement of

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[6]It is possible that the University makes available to employees a non-contractual procedure by which to challenge acts of alleged discrimination not covered by the contract. However, Waters chose to use the contractual grievance procedure, and inasmuch as that grievance procedure did not apply to the two issues he raised, he was deprived of no contractual or statutory right.

exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this memorandum.

In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300.

A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply.

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305, and 32140.

Dated: May 26, 1988

MARTIN FASSLER
Administrative Law Judge